In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

FILED
at 4 O'clock & 00 min P M
Date 4-28-97
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

In the matter of:)
)
FIRST AMERICAN HEALTH)
CARE OF GEORGIA, INC.)
and its wholly owned subsidiaries)
listed on Exhibit "A")
)
Debtors)

Chapter 11 Cases

Numbers 96-20188
through 96-20218

MEMORANDUM AND ORDER
ON OBJECTION TO CLAIM OF PATRICIA FAHEY

Respondent, Patricia Fahey, filed proof of interest number 787 and claim number 555 on June 26, 1996, stating that she holds 3,000 options to purchase stock of the Debtor and also has a corresponding claim for $150,000.00 arising from this interest. On November 13, 1996, the Debtor and the Official Committee of Equity Security Option Holders filed a joint objection to the same. After a hearing on January 30, 1996, I now make the following Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

Debtor operates a home health care business with far flung operations across the United States. On or about June 30, 1994, the Debtor, acting through its chairman and CEO, created a non-qualified stock option plan. The purpose of the Option

Plan was to compensate key employees of the Debtor and its subsidiaries and to secure and retain their services. The plan contained a number of provisions relevant to the matter in controversy at this time. Specifically, the plan created a committee to administer the plan and granted the committee complete authority to determine (1) the individuals who would be granted options, (2) the total number of options which would be granted to any optionee, and (3) the terms and conditions for exercising the same. The committee further was granted complete and exclusive authority to interpret the plan or to prescribe, amend, and rescind rules and regulations relating to it.

The plan further provided that when an option was granted by the committee an option agreement stating the number of shares, the option price, the term of the option, and other relevant specifics was to be delivered to the optionee. All option agreements were to provide that the option "shall terminate with respect to the optionee as of the date the optionee ceases to perform services for the company . . . or to be an employee of the company . . . other than by reason of disability . . . or death." (Exhibit 3, paragraph 5f). An optionee who wished to exercise the option (1) was required to give written notice of the optionee's intent to purchase a specific number of shares, (2) was required to pay the purchase price of the option, (3) became subject to the call rights of the company, and (4) was entitled to the exercise put rights. Pursuant to its call rights and after giving written notice, the company had the right to repurchase the shares at a price to be set by the committee relying primarily on an appraisal by an independent

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third-party appraiser. The optionee, upon exercise of an option, received "put rights," which, upon exercise through written notice, required the company to purchase shares acquired under the option at any time after the shares were issued. Again, the company was required to purchase such shares at the then current market value set by the committee based on an appraisal. (Exhibit 3, paragraph 9).

Upon exercise of the "put rights" by an optionee, "the company shall have the discretion to pay the optionee . . . either one lump sum cash payment or in substantial equal payments over a period no greater than 10 years." (Exhibit 3, paragraph 9). Furthermore, any time the company was required to issue shares pursuant to the exercise of an option, the company had the right to require the recipient to remit, in advance, "an amount sufficient to satisfy any federal, state and local withholding tax requirement prior to the delivery of any certificates for such shares." (Exhibit 3, paragraph 11)

The plan was introduced to the key employees of the Debtor company at a meeting held in Atlanta on September 14, 1994. Debtor's ERISA counsel, David H. Williams, presented the plan during a meeting at which key employees who were to be granted options under the plan were in attendance. Mr. William's presentation concerned the general mechanics of the plan, including an explanation of provisions relevant to this proceeding summarized as follows:

(i) Purpose: primarily to compensate key employees of the Company and its subsidiaries and to secure and retain their services;

(ii) Method of Exercise: options granted under the Stock Option Plan had to be exercised by written notice, accompanied by payment of the $1.00 option exercise price;

(iii) Taxes: upon exercise, the Company had the right to require the Optionee to remit to the Company an amount in cash sufficient to satisfy any federal, state and local withholding tax requirements before the delivery of any certificate for any shares of common stock;

(iv) Payment/Put Rights: upon the exercise of a put to the Company of shares of common stock acquired upon exercise of an option, the Company had the discretion to pay the Optionee either one lump-sum cash payment or in substantially equal payments including interest made over a period no greater than ten years; and

(v) Termination of Options: prior to the Second Amendment to the Stock Option Plan dated February 19, 1996, the Option Agreement terminated upon an Optionee ceasing to perform services for the Company or a subsidiary, or ceasing to be an employee of the Company or a subsidiary, other than by reason of disability or death.

[After the enactment of the Second Amendment to the Stock Option Plan dated February 19, 1996, the Option Agreement terminated only upon an Optionee voluntarily ceasing to perform services for the Company or the expiration date of the option.]

(Exhibit 3, paragraph 5). Ms. Fahey attended the September 1994 meeting in Atlanta when the Stock Option Plan's provisions were explained to all fifty-one optionees. At that the meeting, Ms. Fahey read, reviewed, and signed her 1994 Option Agreement

(Exhibit 4) which granted her an option to purchase 3,000 shares of common stock of the Company. On or about December 22, 1994, Ms. Fahey received a copy of a confidential offer and memorandum dated December 15, 1994, which was provided to each of the key employees who were covered by the plan. (Exhibit 6).

On January 9, 1995, at approximately 4:40 p.m., Debtor's CEO, Mr. Jack Mills, terminated Ms. Fahey's employment with the company. Apparently, earlier that day, Mr. Mills asked Debtor's executive vice-president of human resources, Mr. Frank Wickline, to arrange a 4:30 p.m. meeting with Ms. Fahey in Mr. Wickline's office. At about ten minutes past the scheduled time, Mr. Mills entered the office and informed Ms. Fahey that her services would no longer be needed. The meeting lasted for approximately thirty minutes because, subsequent to her termination, Ms. Fahey related to Mr. Mills some of the Medicare cost information that she had gathered for the company during the previous weeks. Soon thereafter, Mr. Mills left the office. Ms. Fahey and Mr. Wickline then discussed Ms. Fahey's post-severance entitlements, including her pension, 401(k), Cobra benefits, stock options, and PTO's.[1] At the time, Ms. Fahey requested that she be paid her last paycheck, severance pay, and PTO's immediately. Although satisfying this request was contrary to the company's discharge procedure and being late in the day, Mr. Wickline, after making some phone calls, arranged for Ms. Fahey to receive these benefits on an accelerated basis, by noon the

[1] PTO's are the accrued "Paid Time Off" hours that an employee possesses on the date of termination. It was Company policy to include these hours as additional compensation in an employee's severance package. (Exhibit 9).

next day.[2]

Ms. Fahey also asked Mr. Wickline about her stock options during their discussion. Apparently, Ms. Fahey remarked, "I guess I've lost my options?" to which Mr. Wickline responded that he believed her options "were gone." They both then discussed the value of the options when Mr. Wickline stated that he thought they were worth very little as reflected by the fact that most people, including himself, had not exercised any of their options.[3]

After the meeting with Mr. Wickline, Ms. Fahey cleaned out her office and removed all of her personal effects. Thereafter, Mr. Wickline offered to follow Ms. Fahey to her home for the purpose of retrieving the company's lap top computer which Ms. Fahey had in her possession. Ms. Fahey turned over the computer along with some company manuals to Mr. Wickline without incident.

Within the weeks subsequent, Ms. Fahey retained counsel, Martha Dekle, to represent her in matters concerning her ESOP plan, Cobra election, pension plan, expedited disbursement of 401(k) benefits, and copies of her 1993 and 1994 pension

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[2] The company paid Ms. Fahey approximately seven weeks of severance pay representing employment through February 28, 1995.

[3] Mr. Wickline testified that because the company could require an employee to pay all withholding taxes upon exercise and also could elect a ten-year pay-out it was his belief that the options were worth very little. Mr. Wickline speculated that the other employees probably shared his view because only a few of them actually had exercised their options.

statements. On June 24, 1996, approximately a year and one-half subsequent to her termination, Ms. Fahey filed proof of claim number 555 in Debtor's bankruptcy proceeding in the amount of $150,000.00. On September 26, 1996, Ms. Fahey filed a corresponding proof of interest number 787 claiming that she holds 3000 options.[4]

In this proceeding, Ms. Fahey contends that Debtor, through its agent Mr. Wickline, committed an anticipatory breach of contract by misinforming her that her stock options "were gone" when in fact, according to Ms. Fahey's interpretation of the Stock Option Agreement, she could have exercised her options before she concluded her employment with the company at the end of that business day. Specifically, Ms. Fahey's contends that she continued to perform services for Debtor, either by educating Mr. Mills on Medicare cost issues or through the act of returning the company's lap top computer to Mr. Wickline that evening. As a result, she believes that she had the right under the Stock Option Plan to exercise her options at any time prior to returning the computer. Ms. Fahey further asserts that she would have exercised her options, but was prevented from doing so because she relied on Wickline's representation that they "were gone." Ms. Fahey claims that Mr. Wickline's representation was an anticipatory breach of contract by the company through its agent and that because of this breach she was not required to perform her obligations under the contract, namely making a written request

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[4] Within that proof of interest, Ms. Fahey asserted that she was "deliberately mislead" by Mr. Frank Wickline. Ms. Fahey seems to have abandoned that contention and I now hold that the statements made by Mr. Wickline were not a deliberate misrepresentation or made with an intent to deceive. In fact, during the trial, Ms. Fahey testified that she thought of Mr. Wickline as a very honest person who would not deceive her.

to exercise her stock options and including monies due to company, such as the $1 per share exercise amount and any applicable taxes.

In opposition, the Equity Committee contends that pursuant to the terms of the non-qualified stock option plan no option rights accrued in favor of Ms. Fahey following her involuntary termination in January 1995. The Committee asserts that when Mr. Mills informed her that, "her services were no longer needed," Ms. Fahey's employment ceased and, accordingly, she became ineligible to exercise her options. The Equity Committee cites the termination provision of the Stock Option Agreement and contends that because Ms. Fahey ceased being an employee of and/or ceased performing services for the company her contractual right to exercise her options automatically terminated. The Committee also contends that Ms. Fahey did not have the financial ability at the time of her termination to exercise the options. Moreover, besides disputing any characterization of Mr. Wickline's statement as a misrepresentation, the Committee contends that Ms. Fahey was not permitted to rely on his statements because Bill Stewart and not Mr. Wickline was the Debtor's agent in charge of the Stock Option Plan. Finally, the Committee requests the imposition of sanctions asserting that this litigation was not brought in good faith.

Based on the evidence before me I conclude that the objection to Ms. Fahey's claim is sustained and the request for sanctions is denied.

CONCLUSIONS OF LAW

Section 3 of the Nonqualified Stock Option Agreement entitled, "Termination of Employment," provides as follows:

> This agreement shall terminate as to the Optionee if the Optionee ceases to perform services for the Company or a subsidiary or ceases to be an employee of the Company or a subsidiary, other than by reason of disability or death. In that event, this Option shall not be further exercisable by the Optionee, his legatees or his personal representatives.

(Exhibit 4, paragraph 3). The terms of the Option Agreement are plain and unambiguous, including those set forth in Section 3. Pursuant to O.C.G.A. § 13-2-2(2), "words generally bear their usual and common signification." Unless there is some valid reason for doing otherwise, a contract should be construed according to the ordinary meaning of the words employed therein. *See* Stinchcomb v. Clayton County Water Authority, 177 Ga. App. 558, 561 (1986). Dictionaries may be used to supply the plain and ordinary sense of the word. *See* Market Place Shopping Center v. Basic Business Alternatives, Inc., 213 Ga. App. 722 (1994). Clearly, the word "or" as applied to Section 3 of the Option Agreement expresses an alternative or a choice among two or more things. Pursuant to the document's plain language, if Ms. Fahey ceases to "to perform services," or ceases "to be an employee," then her options terminate. Because I now hold that at that moment when Mr. Mills stated to Ms. Fahey "your services are no longer needed," Ms. Fahey ceased to "be an employee of" and ceased "to perform services for," the Company, her claim must be denied.

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At approximately, 4:40 p.m. on January 9, 1995, Mr. Mills entered the office of Mr. Wickline and stated to Ms. Fahey that "your services are no longer needed." Ms. Fahey proceeded to inform Mr. Mills about her recent research on Medicare costs, but Mr. Mills left the office soon thereafter. No evidence was presented that Mr. Mills, Debtor's CEO, repudiated his decision to terminate Ms. Fahey before leaving the office, e.g. she was not told that she could remain until the end of the week to finish her research. To the contrary, Mr. Mills waited until the end of the business day before meeting with Ms. Fahey and she subsequently cleaned out her desk and then left the company. Without additional evidence, I conclude that Ms. Fahey ceased being an employee of the Debtor at 4:40 p.m. on Monday, January 9, 1995.

Additionally, Ms. Fahey also finished performing services for the Debtor at 4:40 p.m. on Monday, January 9, 1995. During the hearing and within her brief, Ms. Fahey contends that either (1) her subsequent report to Mr. Mills about the status of her Medicare research or (2) the act of returning her computer that evening constituted the continued performing of services such that she could have exercised her option were it not for Mr. Wickline's misrepresentation. Both of these contentions are incorrect. First, any Medicare cost information provided by Ms. Fahey was prior to Mr. Wickline's representation and, therefore, has no bearing on whether she was still performing services subsequent to the representation. Further, I hold that the act of returning her computer to Mr. Wickline did not constitute performing services for the company. Testimony revealed that after Ms. Fahey's termination Mr. Wickline offered to follow Ms. Fahey to her residence that evening and pick up the company's lap top computer. Mr. Alan Welch, Debtor's in-house counsel, testified that company policy was to require the return of all company property before the release of any severance benefits. Although it is conceivable to characterize the return of the computer as conferring a benefit or service on the company, because that activity confers an equal or greater benefit on the employee and is also part of the company's post-termination procedure, it is more properly an obligation incidental to discharge rather than employment. In fact, the company, through Mr. Wickline's actions both in picking up the computer and obtaining the immediate release of Ms. Fahey's severance benefits, appeared to take care of or waive all of Ms. Fahey's post-termination obligations, at little or no inconvenience to her. Accordingly, because no evidence was presented of any post-termination services performed by Ms. Fahey for the company with the reasonable expectation of compensation, I hold that she completed performing services at the time she was terminated by Mr. Mills.

As a result, pursuant to the express terms of the 1994 Stock Option Plan, because Ms. Fahey ceased being employed by and/or performing services for the Debtor at approximately 4:40 p.m. on January 9, 1995, she no longer held the contractual right to enforce her options at anytime thereafter and, therefore, her proof of claim and proof of interest must be disallowed.

The Official Committee for Equity Option Holders also moves this Court under Bankruptcy Rule 7011 to assess sanctions in the amount of attorneys' fees and expenses incurred while objecting to Ms. Fahey's claim pursuant their fiduciary duty. That rule in pertinent part states that,

> Every petition, pleading, motion and other paper served or filed . . . shall be signed by at least one attorney of record . . . . The signature . . . constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law; and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay, or needless increase in the cost of litigation or administration of the case.

Fed.R.Bankr.P. 7011. The rule also permits a court to impose on the attorney, the represented party, or both sanctions which may include expenses and reasonable attorney fees. During this hearing, this Court was required to decide a very fact intensive issue while carefully weighing the credibility of each witness. Although this Court issued an order adverse to Ms. Fahey's position, I cannot conclude that her position was, after a reasonable inquiry, either not well grounded in fact or unwarranted by existing law and, therefore, decline to award sanctions.

ORDER

For the foregoing reasons, IT IS THE ORDER OF THIS COURT that

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the objection of the Official Committee for the Equity Option Holders is sustained and that Ms. Patricia Fahey's proof of claim number 555 and proof of interest number 787 be disallowed in its entirety.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 25th day of April, 1997.